

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 JULIA CASTRO,,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Commissioner
15 of the Social Security
Administration,

16 Defendant.
17
18

Case No. CV 13-07699 SS

MEMORANDUM DECISION AND ORDER

19 **I.**

20 **INTRODUCTION**

21
22 Julia Castro ("Plaintiff") seeks review of the final
23 decision of the Commissioner of the Social Security
24 Administration (the "Commissioner" or the "Agency") denying her
25 Disability Insurance Benefits and Supplemental Security Income.
26 The parties consented, pursuant to 28 U.S.C. § 636(c), to the
27 jurisdiction of the undersigned United States Magistrate Judge.
28 For the reasons stated below, the decision of the Commissioner is

1 REVERSED and the action is REMANDED for further review consistent
2 with this decision.

3
4 **II.**

5 **PROCEDURAL HISTORY**

6
7 Plaintiff filed applications for Title II Disability
8 Insurance Benefits ("DIB") and Title XVI Supplemental Security
9 Income ("SSI") on October 30, 2009. (Administrative Record
10 ("AR") 28). In both applications, Plaintiff alleged a disability
11 onset date of October 30, 2006. (Id.). The Agency denied
12 Plaintiff's applications on March 18, 2010, (AR 48), and upon
13 reconsideration on November 10, 2010. (AR 55). On November 24,
14 2010, Plaintiff requested a hearing before an Administrative Law
15 Judge. (AR 62). Plaintiff appeared and testified at a hearing
16 before ALJ Edward Schneeberger on September 7, 2011. (AR 484).
17 On September 12, 2011, the ALJ issued a decision denying
18 Plaintiff DIB and SSI. (AR 22-33). Plaintiff requested review
19 of the ALJ's decision, which the Appeal's Council denied on
20 August 21, 2013. (AR 6). Plaintiff filed the instant action on
21 October 29, 2013.

22
23 **III.**

24 **PLAINTIFF'S CLAIMS**

25
26 Plaintiff challenges the ALJ's decision on two grounds.
27 First, Plaintiff argues that the ALJ erred at step four of the
28 five-step disability evaluation process by concluding that she

1 could perform her past relevant work as typically performed in
2 the national economy despite lacking the English language skills
3 necessary for such work. (Memorandum in Support of Plaintiff's
4 Complaint ("MSPC") at 4-9). Second, Plaintiff contends that the
5 ALJ failed to properly evaluate her subjective pain testimony.
6 (AR 10-16). For the reasons discussed below, the Court agrees
7 with Plaintiff that the ALJ erred at step four of the five-step
8 evaluation process, and remand is therefore proper.

10 IV.

11 STANDARD OF REVIEW

12
13 Under 42 U.S.C. § 405(g), a district court may review the
14 Commissioner's decision to deny benefits. The court may set
15 aside the Commissioner's decision when the ALJ's findings are
16 based on legal error or are not supported by substantial evidence
17 in the record as a whole. Aukland v. Massanari, 257 F.3d 1033,
18 1035 (9th Cir. 2001). "Substantial evidence is more than a
19 scintilla, but less than a preponderance." Reddick v. Chater,
20 157 F.3d 715, 720 (1998). It is "relevant evidence which a
21 reasonable person might accept as adequate to support a
22 conclusion." Id. To determine whether substantial evidence
23 supports a finding, the court must "'consider the record as a
24 whole, weighing both evidence that supports and evidence that
25 detracts from the [Commissioner's] conclusion.'" Aukland, 257
26 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th
27 Cir. 1993)). If the evidence can reasonably support affirming or
28 reversing that conclusion, the court may not substitute its

1 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-
2 21.

3
4 V.

5 DISCUSSION

6
7 The ALJ Erred At Step Four By Failing To Consider
8 Plaintiff's Lack Of English Language Skills In Determining
9 Whether She Could Perform Her Past Relevant Work

10
11 1. Legal Standard

12
13 At step four of the five-step disability evaluation process,
14 "claimants have the burden of showing that they can no longer
15 perform their past relevant work." Pinto v. Massanari, 249 F.3d
16 840, 844 (9th Cir. 2001). A claimant must demonstrate that she
17 cannot perform her relevant prior work "either as actually
18 performed or as generally performed in the national economy."
19 Lewis v. Barnhart, 281 F.3d 1081, 1083 (9th Cir. 2002).
20 "Although the burden of proof lies with the claimant . . . , the
21 ALJ still has a duty to make the requisite factual findings to
22 support his conclusions." Id.; see also Carmickle v. Comm'r,
23 Soc. Sec. Admin., 533 F.3d 1155, 1167 (9th Cir. 2008). An ALJ
24 must therefore look at a claimant's RFC and the physical and
25 mental demands of the claimant's past relevant work in reaching a
26 decision at step four. Pinto, 249 F.3d at 845.

27 \\
28 \\
4

1 "The Social Security regulations provide that the ALJ may
2 draw on two sources of information to define the claimant's past
3 relevant work as actually performed: (1) the claimant's own
4 testimony, and (2) a properly completed vocational report."
5 Lewis, 281 F.3d at 1083. However, the "best source" for how a
6 job is generally performed is usually the Dictionary of
7 Occupational Titles ("DOT"). Pinto, 249 F.3d at 845-46. Thus,
8 in order for an ALJ to accept testimony from a vocational expert
9 ("VE") that contradicts the DOT's definition of a job, "the
10 record must contain 'persuasive evidence to support the
11 deviation.'" Id. at 846 (citing Johnson v. Shalala, 60 F.3d
12 1428, 1435 (1995)).

13 14 **2. Analysis**

15
16 The ALJ found that Plaintiff was capable of performing her
17 past relevant work as a child monitor and home attendant. (AR
18 32). Relying on VE testimony and the DOT, the ALJ provided the
19 following explanation of his decision:

20
21 At the hearing, the vocational expert testified that
22 the claimant had past relevant work as follows: child
23 monitor, which the [DOT] describes as medium, semi-
24 skilled work (D.O.T. 301.677-010, SVP:3); and home
25 attendant, which the [DOT] describes as medium, semi-
26 skilled work (D.O.T. 354.377-014, SVP:3). The
27 vocational expert noted that as performed by the
28 claimant, the job of home attendant required heavy

1 level exertion. However, the vocational expert
2 clarified that this job is typically performed at the
3 medium level. The Administrative Law Judge therefore
4 finds that it is a medium job.

5
6 Further, the vocational expert testified that a
7 hypothetical person with the residual function capacity
8 assessed herein could perform the claimant's relevant
9 work as usually performed in the national economy.
10 Thus, the Administrative Law Judge concurs and finds
11 that the claimant can perform both jobs classified as
12 the claimant's past relevant work.

13
14 (AR 32) .

15
16 In sum, the ALJ found that Plaintiff could not perform her
17 past relevant work as a home attendant as that work was actually
18 performed, i.e., at the heavy level of exertion. (AR 31-32,
19 489). However, based on the VE's testimony and the DOT
20 definition of home attendant work, the ALJ concluded that the
21 Plaintiff could work as a home attendant as that job is typically
22 performed in the national economy, i.e., at the medium level of
23 exertion.¹

24 \\
25

26 ¹ The ALJ found that Plaintiff had the residual functional capacity
27 to perform "the full range of medium work as defined in 20 C.F.R.
28 [§§] 404.1576(c) and 416.967(c), including the following: able to lift
25 pounds frequently and 50 pounds occasionally; and able to stand
and/or walk six hours in an eight-hour workday." (AR 31).

1 Plaintiff argues that this decision was erroneous because
2 she lacked the requisite language skills to engage in work as a
3 home attendant as that job is defined in the DOT. (MSPC at 4).
4 The DOT, which is part of the record for review in Social
5 Security cases, see, e.g., Pinto, 249 F.3d at 845-46; 20 C.F.R.
6 § 404.1566(d), provides that a home attendant must have Level 2
7 language skills, which include a passive vocabulary of 5,000-
8 6,000 words, the ability to write compound and complex sentences,
9 and the ability to speak clearly and distinct with appropriate
10 pauses and emphasis, correct punctuation, variations in word
11 order, using present, perfect and future tenses. See D.O.T.
12 354.377-014.² The Administrative Record is replete with evidence
13 that Plaintiff, who used an interpreter to communicate during her
14 hearing before the ALJ, (AR 486), is a native Spanish speaker who
15 does not possess Level 2 English language skills. (See AR 24-27,
16 69-73, 204-05, 256, 262, 286, 293, 306, 311, 317, 326, 332, 336,
17 344, 373, 379, 445, 489-90). Plaintiff is therefore correct that
18 pursuant to the DOT, she lacked the necessary skills for home
19 attendant work as it is typically performed.

20
21 Despite the divergence between Plaintiff's abilities and the
22 requirements for home attendant work found in the DOT, the ALJ,
23 relying on the VE's testimony, found that Plaintiff was capable
24 of performing her past relevant work as a home attendant. (AR
25

26 ² Although the DOT does not specify that an individual must be able
27 to perform these functions in English, the Ninth Circuit has recognized
28 that such a reading "is the most persuasive" interpretation of the
dictionary's job requirements. Pinto, 249 F.3d at 844 n.2 (citing DOT
Appendix C and 20 C.F.R. §§ 416.964(b)(5), 404.1564(b)(5)).

32). However, "[i]n order for an ALJ to accept vocational expert testimony that contradicts the [DOT], the record must contain 'persuasive evidence to support the deviation.'" Pinto, 249 F.3d at 846; see also Massachi v. Astrue, 486 F.3d 1149, 1153-54 (9th Cir. 2007) (ALJ may not rely on VE testimony regarding requirements of a particular job without first inquiring whether the testimony conflicts with the DOT). Specifically, where an ALJ relies on a job description in the DOT with language requirements exceeding those possessed by the claimant, the ALJ or VE must address the impact of the claimant's language skills on her ability to perform that work. See Pinto, 249 F.3d at 847.³

Here, neither the ALJ not the VE explained how Plaintiff's limited language abilities impacted her ability to perform home

³ Although the ability to communicate encompasses skills "that Social Security Rule No. 96-8P requires an ALJ to consider [at step four]," the Ninth Circuit in Pinto declined to reach the question of whether language skills may properly be considered at step four of the disability evaluation process. See Pinto, 249 F.3d at 846 n.5 (citing conflicting authority). However, because the ALJ in Pinto acknowledged the plaintiff's illiteracy but failed to take the next step in the analysis, i.e., to actually address "the impact of [the plaintiff's] illiteracy" on her ability to perform her past relevant work, the court of appeals remanded the case for further consideration. Id. at 846 n.5, 847.

Here, the ALJ questioned Plaintiff regarding her educational background and observed that she used an interpreter during her hearing. (AR 486, 489-90). The ALJ asked the VE, who was present for Plaintiff's testimony, if he had reviewed the record, which, as discussed above, contained ample evidence that Plaintiff lacked English language skills. (AR 494). It is true that the ALJ did not expressly reference Plaintiff's language limitations in the RFC or during the hearing. However, the Court does not read Pinto as permitting an ALJ who recognizes a claimant's language limitations to insulate his step four decision from review by omitting from his analysis any express discussion of manifest language limitations.

1 attendant work that, as typically performed in the national
2 economy, requires Level 2 language skills. Because the ALJ's
3 decision lacked a persuasive explanation as to why Plaintiff
4 could perform work requiring skills exceeding those that she
5 possessed, the Court cannot affirm the ALJ's step four
6 determination. Furthermore, it is not clear from the ALJ's
7 decision whether he determined that Plaintiff was capable of
8 performing her past relevant work as a child monitor as actually
9 performed or as usually performed. To the extent the ALJ found
10 the latter, the record lacks any discussion concerning how
11 Plaintiff's limited language skills impacted her ability to
12 perform such work, which, per the DOT, also requires Level 2
13 language skills. See D.O.T. 301.677-010.

14
15 Accordingly, this matter is remanded for clarification
16 regarding (1) how Plaintiff's language skills impact her ability
17 to perform her past relevant work as a home attendant as
18 typically performed, and (2) whether Plaintiff is able to perform
19 her past relevant work as a child monitor as actually performed
20 or as typically performed. If the ALJ concludes that Plaintiff
21 is capable of performing her past relevant work as a child
22 monitor as typically performed, he must address how Plaintiff's
23 language skills impact her ability to perform this work.

24 \\
25 \\
26 \\
27 \\
28 \\
9

VI.

CONCLUSION

Consistent with the foregoing, and pursuant to sentence four of 42 U.S.C. § 405(g), IT IS ORDERED that judgment be entered REVERSING the decision of the Commissioner and REMANDING this action for further proceedings consistent with this Memorandum and Order. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and Judgment on counsel for both parties.

DATED: June 27, 2014

/s/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

THIS MEMORANDUM IS NOT INTENDED FOR PUBLICATION NOR IS IT INTENDED TO BE INCLUDED OR SUBMITTED TO ANY ONLY SERVICE SUCH AS WESTLAW OR LEXIS